

**Testimony in Support of 2007 SB 418, 419 and 420**  
**Senate Committee on Judiciary, Corrections & Housing**  
**January 29, 2008**  
**Marla J. Stephens**  
**Chair, Wisconsin Judicial Council**

**Introduction.**

Good morning Senators Taylor, Sullivan, Vinehout, Lazich and Grothman. I am Marla Stephens, the current chairperson of the Wisconsin Judicial Council, and I am urging you to recommend passage of SB 418, 419 and 420 to revise several rules of appellate procedure. As you know, Sen. Taylor sponsored this bill at the request of the Council.

Beginning in 1997, the Judicial Council's Appellate Procedure Committee<sup>1</sup> solicited and reviewed suggestions for changes to the appellate rules governing criminal, civil commitment, protective placement, children's code and juvenile justice code appeals. After numerous drafts of proposals were circulated among advisory committee members<sup>2</sup> for comment, the full Council approved a comprehensive proposal to amend the rules of appellate procedure contained in WIS. STAT. CHAPTERS (RULES) 808 and 809. The Council asked the Wisconsin Supreme Court to exercise its rulemaking authority to effect these changes in February 2000. In April 2001, the court granted the Council's petition<sup>3</sup>, with three exceptions. During the hearings on the petition, the justices indicated that three proposals were more appropriate for legislation than rulemaking, because they seek to modify appellate court jurisdiction. Those three proposals are the subject of SB 418, 419 and 420.

**2007 SB 418 tolls the time limit for filing a petition for review in the Supreme Court while a motion for reconsideration is pending in the court of appeals.**

Under current law, a person seeking Supreme Court review of a court of appeals decision has 30 days to file a petition for review in the Supreme Court. At the Council's request, the Supreme Court created Rule 809.24 to allow a person to file a motion for reconsideration in the court of appeals. The reconsideration rule was necessary to correct errors in the court of appeals decision that likely would not merit Supreme Court review, and was consistent with the court of appeals' internal operating procedures. The Supreme Court could not, however, toll the 30-day time limit for filing the petition for review while the motion for reconsideration was pending. This is so because the 30-day time limit for filing a petition for review established by current § 808.10 is jurisdictional and cannot be extended by the court. *See First Wis. Nat. Bank of Madison v. Nicholaou*, 87 Wis. 2d 360, 365-66, 274 Wis. 2d 704 (1979). Only the legislature can effect changes in the Supreme Court's jurisdiction.

Sections 1 and 2 of this bill, amending current § (Rule) 808.10, toll the time for filing or responding to a petition for review (of a court of appeals decision or order) in the supreme court while a timely motion for reconsideration of the same decision or order is pending in the court of appeals. Sections 4, 5, 6, 7 and 8 establish time frames for filing a petition, a supplemental petition, an amendment to a pending petition, and a response in the Supreme Court following resolution of a motion for reconsideration. They are intended to avoid unnecessary duplication of effort for the parties and the appellate courts, and minimize unnecessary expense.

Sections 4 and 6 of the bill also create cross-references within the petition for review Rules, §§ 809.32(4) and 809.62, to the proposed time limit tolling provision, and are offered to alert practitioners, parties and the courts to the changes in the time limit for filing a petition for supreme court review or a response.

Section 3 of the bill states that no motion for reconsideration may be filed in a termination of parental rights case due to the abbreviated appeal time limits provided in § (Rule) 809.107.

**2007 SB 419 allows suppression of evidence issues to be raised on appeal in ch. 938 cases following an admission to a petition.**

Under current law a juvenile cannot appeal from an order denying a motion to suppress evidence or a motion to exclude a statement in a ch. 938 (Juvenile Justice Code) case unless the juvenile preserves these suppression issues by proceeding with a trial.<sup>4</sup> If the juvenile admits to the petition, he or she waives these issues for appeal.

Current law also provides a statutory exception to this waiver rule in criminal cases in WIS. STAT. § 971.31(10), which allows defendants to appeal suppression rulings following a guilty plea.

Rulings on suppression issues often determine the merit or outcome of a case. (If the evidence is admissible, the state has a case. If the evidence is suppressed or the statement is excluded, the state has no case.)

In order to avoid unnecessary trials, the Council recommended the creation of § (Rule) 808.03 (3) and § 938.297 (8) to allow suppression and admissibility appeals following an admission of, or a plea of no contest to, the allegations in a delinquency

petition filed under ch. 938. For the same reason, section 3 of the bill is offered at this time to include a no contest plea, an admission, or a consent to criminal charges within the waiver exceptions in § 971.31 (10).

**2007 SB 420 clarifies that appeals in ch. 980 (sexually violent person commitment) and § 971.17 (not guilty by reason of mental disease or defect commitment) proceedings are subject to the unified appeal procedures in Rules 809.30 - .32.**

The Judicial Council petition proposed what subsequently-enacted § 980.038 (4) requires: that appeals in ch. 980 cases proceed under the unified appeal procedure, set forth in WIS. STAT. §§ (Rules) 809.30-.32. Wisconsin's unified appeal procedure governs all other appeals (under ch. 48, 51, 55 and 938 and in criminal cases) in which a person has the right to appointed counsel. It requires an appellant to raise all issues in the first appeal as of right.

Although current case law<sup>5</sup> establishes that § 971.17 proceedings are subject to the unified appeal procedures in §§ (Rules) 809.30-.32, the current rules and statutes do not reflect this.

The language proposed in sections 2, 3, 4, 5, 6, 7, 9 and 10 amends § (Rule) 808.04 (3) and (4) and § (Rule) 809.30 (1) and (2) to specify the cases governed by this appellate procedure, and tracks the Judicial Council's petition. Bill sections 1, 11, 12 and 13, creating §§ 48.465, 938.47, 971.17(7m) and 980.038 (4) (a), are offered at this time to assist the courts, the practitioners and the parties in these cases by alerting them to the applicable appellate procedure rules.

These changes will promote efficiency for the parties, courts and practitioners by eliminating successive appeals and remands, by clarifying the appropriate appellate procedure in all cases, and by incorporating the case law to give fair notice of the appropriate procedures in § 971.17 proceedings.

### **Conclusion.**

All three proposals were approved by the Judicial Council after reaching consensus among its members: a supreme court justice, four circuit court judges, one court of appeals judge, the Attorney General's representative, a district attorney, the State Public Defender's representative, the Director of State Courts, the Revisor of Statutes, the chairpersons of the State Senate and Assembly Judiciary Committees, representatives of the deans of the law schools of Marquette University and the University of Wisconsin, the president-elect and three representatives from the State Bar of Wisconsin, and two citizens appointed by the Governor.

These proposals were drafted and reviewed by advisory committee members representing the constituencies that would be affected by the changes – the clerk of the supreme court and court of appeals, a supreme court commissioner, the Wisconsin Department of Justice Legal Services Division, the Wisconsin State Public Defender Appellate Division, the Wisconsin Association of Criminal Defense Lawyers, Wisconsin Manufacturers & Commerce, the Milwaukee Bar Association's Court of Appeals Bench & Bar Committee, the Wisconsin District Attorneys Association, the Milwaukee County Deputy District Attorney, and the Appellate Practice and Criminal Law Sections of the State Bar.

On behalf of the Judicial Council, I urge you to advance these proposals through legislation. They reflect the core mission of the Judicial Council – to study and propose efficiencies in practice and procedure to the Supreme Court and the legislature – and are the missing pieces necessary to make the comprehensive revision first proposed in 2000 function properly. Individual institutional workloads (courts, SPD, DOJ, and DAs) are increasing as budgets decrease. These changes could give a bit of a workload relief, by eliminating unnecessary procedures in circuit and appellate courts, and by making appellate procedure more uniform, without sacrificing any substantive rights.

Thank you.

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<sup>1</sup> The Judicial Council Appellate Procedure Committee members included the Hon. Ted E. Wedemeyer, Jr., Presiding Judge, Court of Appeals, District I, co-chair; Marla J. Stephens, Director, Wisconsin Public Defender Appellate Division, co-chair; Mary E. Burke, Assistant Attorney General, Wisconsin Department of Justice Criminal Appeals Unit; and Margaret Carlson, Chief Staff Attorney, Court of Appeals.

<sup>2</sup> Advisory committee members, who drafted, reviewed or suggested changes in the rules, were: Shelley A. Grogan, Judicial Clerk to Judge Wedemeyer; Hon. Daniel P. Anderson, Judge, District II Court of Appeals; Marilyn L. Graves, Clerk of Supreme Court and Court of Appeals; Cornelia G. Clark, Clerk of Supreme Court and Court of Appeals; Joseph M. Wilson, Supreme Court Commissioner; Matthew J. Frank, Administrator, Wisconsin Department of Justice Legal Services Division; Kenneth Lund, Deputy First Assistant, Wisconsin Public Defender Appellate Division; Keith A. Findley, University of Wisconsin Law School; Robert R. Henak, Henak Law Offices, S.C., for the Wisconsin Association of Criminal Defense Lawyers; Patrick K. Stevens, Wisconsin Manufacturers & Commerce; Lynn R. Laufenberg, Laufenberg Law Offices; Charles H. Barr, Croen & Barr, for Milwaukee Bar Association Bench & Bar Court of Appeals Committee; Thomas McAdams, Assistant District Attorney for Milwaukee County, for Wisconsin District Attorney's Association; Robert D. Donohoo, Deputy District Attorney for Milwaukee County; Werner E. Scherr, Kasdorf, Lewis & Sweitlik, S.C.; Thomas M. Olson, S.C., The Law Center; Elizabeth Ewald Herrick, Attorney at Law; and Donald L. Romundson, Godfrey & Kahn, S.C., for the Appellate Practice Section, State Bar of Wisconsin. The Judicial Council gratefully acknowledges their contributions.

<sup>3</sup> Order No. 00-02, 2001 WI 39.

<sup>4</sup> "The general rule is that a guilty, no contest, or Alford plea 'waives all non-jurisdictional defects, including constitutional claims[.]'" *State v. Keltz*, 2006 WI 101, ¶18.

<sup>5</sup> *State v. Mahone*, 127 Wis. 2d 364, 381 n.7 (Ct.App. 1985).